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**In the Supreme Court
of the United States**

OCTOBER TERM, 1972

No. 72-212

**HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,**

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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The petitioner, Hoyt C. Cupp, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 30, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals, not yet reported, is reprinted as Appendix A hereto. The opinion of the United States District Court for the District of Oregon, not reported, is reprinted as Appendix C hereto. The opinion of the Court of Appeals of the State of Oregon affirming respondent's conviction of second degree murder is reported at 2 Or. App. 251,

465 P.2d 900, cert. denied 400 U.S. 944 (1970), and is reprinted as Appendix D hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 30, 1972. A timely petition for rehearing en banc was denied on July 6, 1972 (see Appendix B), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Fourth Amendment prohibit police officers from momentarily detaining a murder suspect who is not in custody and scraping his fingernails for evidence, without obtaining a search warrant or formally arresting the suspect, when the police in fact have probable cause to arrest or search the suspect, and when the delay required to obtain a warrant would frustrate the search by allowing the suspect to clean his fingernails?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A state-court jury convicted Daniel P. Murphy, respondent herein, of the second degree murder of his wife. His conviction was affirmed by the Oregon Court of Appeals. *State v. Murphy*, 2 Or. App. 251, 465 P.2d 900 (1970) (Appendix D). This Court denied his petition for certiorari. 400 U.S. 944 (1970).

Murphy then commenced the present federal habeas corpus action in the United States District Court for the District of Oregon. The district court, per Solomon, J., denied the petition (Appendix C). On appeal, the Ninth Circuit, in a per curiam opinion by Jertberg, Ely, and Hufstedler, JJ., reversed and remanded (Appendix A). Murphy's present custodian, the petitioner herein, seeks review of the Ninth Circuit's decision.

Only one issue has been raised and preserved throughout these proceedings. In Murphy's state court trial, as part of its showing that Murphy strangled his wife while she was in bed, the prosecution introduced evidence that certain scrapings taken from under Murphy's fingernails consisted in part of skin cells, blood cells, and white cotton fiber. Murphy contends, and petitioner herein denies, that the fingernail scrapings in question were unconstitutionally seized from him.

The facts concerning the seizure of the evidence in question are generally undisputed. What follows is the statement of those facts contained in the decision of the Oregon Court of Appeals, which statement is the most complete summary of the facts made by any of the courts below.

"On August 25, 1967, City of Portland detectives, Hutchins and Prunk, were assigned to investigate the murder of Doris Murphy. They arrived at the Murphy home shortly after 8 a.m. They could see throat lacerations and abrasions and it appeared to the detectives that Mrs. Murphy had been strangled. The deceased was lying on her back in bed and the bed was perfectly made up. There were no signs of forced entry, struggle, or robbery. The detectives talked to the son of the deceased and defendant. The son told them that the defendant had been away and had been expected home the night of August 24. By making a telephone call to Camp Sherman, Oregon, and talking to a Mr. Jones, the detectives learned that the defendant had left Camp Sherman on the night of the 24th to go to Portland. They also learned from the defendant's son that the deceased and the defendant did not get along well and in the past "had fights." While talking to the son the detectives noticed that he had "no fingernails." Through Mr. Jones Detective Prunk left a death message at Camp Sherman for defendant.

"At 4 p.m. on the same day, August 25, defendant called the Portland police station and talked to Detective Prunk. Without asking any questions about his wife defendant immediately began to tell Prunk where he had been the night before. He also agreed to come to Portland immediately. Defendant told Prunk on the telephone that he had left Camp Sherman about 8 p.m. the night of the 24th in his old pickup to bring a washing machine to Portland to be repaired and on the way had stopped in Salem for a couple of drinks. When he got home the door was

locked so he slept in the pickup parked in the driveway. Early in the morning he woke up and tried to push the truck out of the driveway because it made a lot of noise, but it got caught in the step or curb. He then drove off to another place where he slept until daylight and then took the washing machine to be repaired.

"The defendant did return to Portland and went to the Portland police station about 7:45 p.m. When Detective Hutchins saw the defendant in the police station he noticed a dark spot on defendant's right thumb. This prompted him to think about fingernail scrapings although, as he put it, he probably would have anyway in view of the fact that he had observed lacerations on the throat of the deceased. While the defendant and the detectives were discussing the case, two lawyers representing the defendant arrived. The discussion continued after the lawyers arrived and during this time a deputy district attorney who was present and the two detectives discussed taking fingernail scrapings. The defendant refused to give the fingernail scrapings or to take polygraph test and exhibited a disinterest in the case. Nevertheless, the police detained the defendant long enough to take the scrapings in question and then released him."

After reviewing these facts, both the Oregon Court of Appeals and the federal district court held, in essence, that:

(1) At the time they obtained the fingernail scrapings in question, the police had probable cause to search Murphy's person, or to arrest him, or both:

(2) Since the police had probable cause to arrest him, Murphy could not complain of the fact that, after the police had discussed the taking of fingernail scrapings with a deputy district attorney, Murphy himself, and defense counsel, Murphy was merely detained while the scrapings were taken and then released; and

(3) The police were justified in immediately taking the fingernail scrapings from Murphy, since any effort to obtain a warrant for that purpose would have required the police, not only to detain him longer than they did, but also to restrain him, guard him or otherwise place him in a position where he could not destroy the evidence in question by clipping his nails, putting his hands in his mouth, going to the lavatory, or cleaning his hands in some other way.

The Ninth Circuit, however, disagreed, saying that

"* * * there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant."

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important question of Fourth Amendment law in a way in conflict with the final decision of the courts of the State of Oregon on precisely the same question.

See Appendices A and D, below.

B. The Court of Appeals has decided an important question of Fourth Amendment law in a way in conflict with the applicable decisions of this Court.

As noted above, both the Oregon Court of Appeals and the federal district court held that the police had probable cause either to get a warrant to search Murphy's person or to arrest him at the time they obtained the evidence challenged in these proceedings. The Ninth Circuit's opinion in this case also assumes that such probable cause existed, but nevertheless holds

that there were no exigent circumstances justifying the warrantless search and seizure which took place. This holding is clearly at variance with the decisions of this Court which recognize that the Fourth Amendment does not prohibit immediate action by the police, when the delay involved in obtaining a warrant is likely to result in the loss of evidence.

Thus, for example, probable cause will clearly support an immediate search of an automobile without a warrant, and without a prior arrest of the occupants, where the potential mobility of the automobile may result in the loss of evidence if an immediate search is not conducted. *Chambers v. Maroney*, 399 U.S. 42, 49 (1970); *Carroll v. United States*, 267 U.S. 132, 158-159 (1925). And immediate seizure of evidence from the person may be justifiable where the evidence will dissipate itself with the lapse of time. *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

In this case, the police were clearly confronted with the necessity for immediate action, because of the speed and ease with which Murphy could have destroyed the traces of incriminating evidence found under his fingernails, if left free to do so. Since the police had probable cause to search for that evidence, and needed to act immediately to avoid the risk of its destruction, their scraping of Murphy's fingernails to obtain that evidence was not unreasonable and is not prohibited by the Fourth Amendment.

The opinion of the Ninth Circuit correctly notes that Murphy was not formally under arrest at the time the

challenged search was made, nor was he arrested for some time thereafter. But, as this Court has noted in a somewhat different context, there is no constitutional right to be arrested. *Hoffa v. United States*, 385 U.S. 293, 310 (1966). And in this case, a formal arrest clearly would not in itself have conferred upon Murphy any constitutional protection from the search which was conducted. See, e.g., *United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1969) (seizure of hair samples from person in custody); *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968) (examination of defendant's hands under ultraviolet light); *Brent v. White*, 398 F.2d 503 (5th Cir. 1968), cert. denied 393 U.S. 1123 (1969) (genital scrapings revealing rape victim's blood).

Accordingly, there is no reason to hold, as the Ninth Circuit suggests, that the Fourth Amendment requires the police to commit a greater invasion of Murphy's privacy, by formally arresting and detaining him indefinitely, when the lesser action of detaining him only long enough to conduct the challenged search would adequately serve the purpose of the criminal investigation. The search complained of here should not only be tolerated under the Fourth Amendment, but encouraged as preferable to the more drastic alternative of a full-scale arrest for murder.

Finally, this Court has indicated in various factual contexts that Fourth Amendment standards of reasonableness are not inflexible, but permit governmental responses of varying magnitude in proportion to the gravity of the factual situation involved. See, e.g. *Adams*

v. Williams, — U.S. —, 40 U.S.L.W. 4724 (No. 70-283, June 12, 1972); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *McCray v. Illinois*, 386 U.S. 300 (1967). In contrast, the opinion of the Ninth Circuit in this case holds that an immediate search of the person cannot be conducted to obviate the clearly present risk herein that highly perishable evidence will be destroyed, and suggests that a formal arrest is always a prerequisite for even the limited search of the person which took place here, on the basis of probable cause therefor and with compelling reasons for immediate action. Such rulings not only represent a mechanical and inflexible reading of the Fourth Amendment at variance with the decisions of this Court, but also have obvious implications beyond the immediate factual context of this case. Accordingly, whether or not this case should stand as a precedent, in the Ninth Circuit and elsewhere, is a question eminently deserving the full consideration of this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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August, 1972

APPENDIX A

OPINION OF THE UNITED STATES
COURT OF APPEALS

DANIEL P. MURPHY,)	
<i>Petitioner-Appellant,</i>)	
vs.)	
)	No. 71-2203
HOYT C. CUPP,)	
<i>Respondent-Appellee.</i>)	

[May 30, 1972]

Appeal from the United States District Court for the
District of Oregon

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit
Judges.

PER CURIAM:

Murphy is an Oregon state prisoner, convicted of second degree murder. After having exhausted his state remedies, he filed a petition for habeas corpus relief in the District Court, alleging therein that he had been the victim of a search proscribed by the federal constitution. The District Court denied the petition, and this appeal followed.

The victim of the homicide was Murphy's wife, and sometime after her body was discovered, Murphy and his attorney were present in the station of the investigating police officers. The police expressed a desire to

take scrapings from Murphy's fingernails. Acting upon the advice of his attorney, made in the presence of the police, Murphy protested, claiming that such a search would be illegal. The police insisted, and Murphy, declining to provoke violence, submitted to the search while, at the same time, expressly reserving his right to continue, in the future, to urge that the search was constitutionally impermissible. Thereafter, in the state court trial that culminated in Murphy's conviction, the prosecution introduced the scrapings into evidence over Murphy's objection.

The appellee has conceded that Murphy was not under arrest at the time the challenged search was made, and our review of the record convinces us that there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant. *See Vale v. Louisiana*, 399 U.S. 30, 34-35, 26 L. Ed. 2d 409, 413-14, 90 S. Ct. 1969, 1971-72 (1970); *Schmerber v. California*, 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 919-20, 86 S. Ct. 1826, 1835-36 (1966). Thus, the search was illegal. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 22 L. Ed. 2d 676, 681, 91 S. Ct. 2022, 2031-32 (1971). *Cf. Davis v. Mississippi*, 394 U.S. 721, 727-28, 29 L. Ed. 2d 564, 575-76, 89 S. Ct. 1394, 1397-98 (1969).

Upon remand, the District Court will hold Murphy's petition in obedience for a reasonable time, not exceeding

sixty days, in order to afford the Oregon authorities the opportunity to retry Murphy, should they choose to do so, without the introduction of the impermissible evidence.

Reversed and remanded.

APPENDIX B**ORDER DENYING PETITION FOR REHEARING**

[July 6, 1972]

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

OPINION OF THE UNITED STATES
DISTRICT COURT

DANIEL P. MURPHY,)	
Petitioner,)	Civil No. 70-883
vs.)	OPINION
HOYT C. CUPP, Superintendent,)	June 2, 1971
Respondent.)	

* * *

SOLOMON, Judge:

Daniel P. Murphy was found guilty in the state court of second degree murder. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. He seeks habeas corpus relief here. 28 U.S.C. §§ 2241 et seq.

On the day that Murphy's wife was strangled, the police asked Murphy to report to them for questioning. He came, but objected when the investigating officers requested scrapings from his fingernails. Scrapings were taken and used against him at trial.

He contends that the admission of this evidence violated his federally protected constitutional rights because the scrapings were taken without a warrant and not incident to arrest.

The opinion in the Oregon Court of Appeals reports the circumstances of Mrs. Murphy's death and Murphy's arrest in detail. The Court approved the trial court's finding that the fingernail scrapings were admissible.

State of Oregon v. Murphy, 90 Or. Adv. Sh. 679, 465 P.2d 900 (Or. App. 1970).

The facts of this case are not disputed. Murphy submitted his petition solely on the state court record. I have reviewed the record. I find that he had a full and fair hearing not only on his motion to suppress but also in the other proceedings in the trial and appellate courts. 28 U.S.C. §§ 2254(d); *Townsend v. Sain*, 372 U.S. 293, 312-313 (1963).

I agree with the reasoning of the unanimous opinion in the Oregon Court of Appeals. The investigating officers had probable cause either to get a search warrant or arrest Murphy. Instead, they merely obtained finger-nail scrapings, which Murphy could have destroyed easily if given the opportunity.

The petition is denied.

APPENDIX D

OPINION OF OREGON COURT OF APPEALS

[March 12, 1970]

Before Schwab, Chief Judge, and Langtry and Foley, Judges.

Affirmed.

SCHWAB, C. J.

The defendant was tried to a jury on the charge of murder of his wife. He was convicted of murder in the second degree. On appeal he contends that fingernail scrapings taken from him against his will were wrongfully received in evidence. The state produced testimony that analysis of the scrapings revealed skin, blood cells, and white cotton fiber. This evidence was obviously introduced as tending to prove that the defendant had acquired these substances under his fingernails by strangling his wife while she was in bed.

At the time the police took the fingernail scrapings they had not formally arrested the defendant. He was not charged with murder or any other crime until about a month later. The defendant's position is that the police did not have a right to search him by taking scrapings from his fingernails without his consent and without a warrant, except as incident to a lawful arrest.

We borrow in large part from the statement of facts in defendant's brief.

On August 25, 1967, City of Portland detectives, Hutchins and Prunk, were assigned to investigate the

murder of Doris Murphy. They arrived at the Murphy home shortly after 8 a.m. They could see throat lacerations and abrasions and it appeared to the detectives that Mrs. Murphy had been strangled. The deceased was lying on her back in bed and the bed was perfectly made up. There were no signs of forced entry, struggle, or robbery. The detectives talked to the son of the deceased and defendant. The son told them that the defendant had been away and had been expected home the night of August 24. By making a telephone call to Camp Sherman, Oregon, and talking to a Mr. Jones, the detectives learned that the defendant had left Camp Sherman on the night of the 24th to go to Portland. They also learned from the defendant's son that the deceased and the defendant did not get along well and in the past "had fights." While talking to the son the detectives noticed that he had "no fingernails." Through Mr. Jones Detective Prunk left a death message at Camp Sherman for defendant.

At 4 p.m. on the same day, August 25, defendant called the Portland police station and talked to Detective Prunk. Without asking any questions about his wife defendant immediately began to tell Prunk where he had been the night before. He also agreed to come to Portland immediately. Defendant told Prunk on the telephone that he had left Camp Sherman about 8 p.m. the night of the 24th in his old pickup to bring a washing machine to Portland to be repaired and on the way had stopped in Salem for a couple of drinks. When he got home the door was locked so he slept in the pickup

parked in the driveway. Early in the morning he woke up and tried to push the truck out of the driveway because it made a lot of noise, but it got caught in the step or curb. He then drove off to another place where he slept until daylight and then took the washing machine to be repaired.

The defendant did return to Portland and went to the Portland police station about 7:45 p.m. When Detective Hutchins saw the defendant in the police station he noticed a dark spot on defendant's right thumb. This prompted him to think about fingernail scrapings although, as he put it, he probably would have anyway in view of the fact that he had observed lacerations on the throat of the deceased. While the defendant and the detectives were discussing the case, two lawyers representing the defendant arrived. The discussion continued after the lawyers arrived and during this time a deputy district attorney who was present and the two detectives discussed taking fingernail scrapings. The defendant refused to give the fingernail scrapings or to take a polygraph test and exhibited a disinterest in the case. Nevertheless, the police detained the defendant long enough to take the scrapings in question and then released him.

By holding the defendant long enough to take fingernail scrapings from him, the detectives did not *arrest* the defendant in the strict sense of the word. An *arrest* in its strict sense is the taking of a person into custody for the commission of an offense as the prelude to prosecuting him for it. *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). It follows

that the state cannot rely on the rule that "The notable exception to the demand for a search warrant is, of course, the search made as an incident of a lawful arrest." *State v. Chinn*, 231 Or 259, 373 P2d 392 (1962). This rule, however, is not determinative of the case at hand for, while the incident-to-arrest exception is "notable" it does not follow that it is exclusive.

"* * * In terms of the quantum of evidence required, this [probable cause for a search] is substantially the equivalent of the probable cause needed for an arrest warrant and of the reasonable grounds needed for an arrest without warrant." LaFave, *Search and Seizure: The Course of True Law* * * * *Has not* * * * *Run Smooth*. 255 Ill L Form 259-60 (1966).

In the usual situation, as in this case, the same evidence that constitutes probable cause to arrest constitutes probable cause to search the person arrested for evidence of the crime for which he is seized. Perhaps this is the reason that in many cases courts have upheld warrantless searches which came prior to arrest by characterizing the searches as "incident to arrest."

"Search before arrest is not uncommon in current practice. In some instances, the search precedes the formal announcement of arrest because it is necessary for the officer to act quickly for his own protection. In many instances, however, no formal announcement is made because the officer knows that the person will not actually be taken to the station unless the search proves to be fruitful. That is, in those cases where the defendant might be arrested because of reasonable grounds to believe he presently possesses contraband, the common sense sequence—as far as the police are concerned—is search followed by arrest only if contraband is found, as opposed to arrest, search, and then release if nothing is found.

"In these and similar cases, the better view is that the search is not unlawful merely because it precedes the arrest. Such is the California position, which has been explained as follows:

"Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it."²⁸⁴

"* * * * *

"²⁸⁴ *People v. Simon*, 45 Cal. 2d 645, 648, 290 P.2d 531, 533 (1955)." LaFave, *Search and Seizure* * * -, supra, at 303.

The majority of the Oregon Supreme Court apparently is of the same mind as the California court in *People v. Simon*, 45 Cal2d 645, 290 P2d 531 (1955). In *State v. Elk*, 249 Or 614, 439 P2d 1011 (1968), those who concurred in the prevailing opinion characterized as incident to arrest a car search which occurred 20 to 25 minutes prior to arrest and 200 to 250 yards away. The search was upheld on the basis of a more realistic, workable and theoretically sound rationale in two concurring opinions which represented the views of four concurring justices. While the two concurring opinions

were not in complete agreement on all of the issues of that case they shared the same view on the issue we are here considering. The view upon which the four concurring justices agreed is set forth in that portion of Mr. Justice O'Connell's opinion which states:

"The majority opinion upholds the search in the present case on the ground that it was incident to the arrest. This is erroneous. A search and seizure cannot be an 'incident' of an arrest which took place at a later time. It is not made any the more so by assertions that 'the arrest and search were part of one uninterrupted transaction' or that the search is 'not remote in time or place from the site of the arrest.'

"However, the search and seizure in the present case can be upheld upon another ground. The information Officer Rothermel had received, together with his observations before lifting the trunk lid, was sufficient to give him probable cause to believe that the stolen gun was in the trunk. Upon the basis of this information, there would have been no difficulty in obtaining a search warrant. But to obtain a warrant it would have been necessary for Rothermel to leave the car and if he left it he could not know when the person who drove the car there would return and drive it away together with the evidence in it. Rothermel had been informed that those who had driven up in the car were in the immediate vicinity. Because of the risk of losing the evidence if a warrant were sought, it was impracticable to obtain a warrant. Under these circumstances a search of the trunk was reasonable." *State v. Elk*, supra, at 624-25.

If the police had probable cause to search the defendant and probable cause to believe that it was necessary that they search him without taking the time to

first obtain a search warrant, their right to search him immediately was not defeated by their failure to exercise their right to arrest him. "There is no constitutional right to be arrested." *Hoffa v. United States*, 385 US 293, 87 S Ct 408, 17 L Ed 2d 374, reh den 386 US 940 (1966). To hold otherwise would be to require the police to arrest so as to search incident to that arrest. The court should not require greater invasion of privacy where lesser invasion would satisfy the public purpose. Situations exist where arrest would be unwise despite the circumstances of probable cause. Cf. *Hoffa v. United States*, *supra*. While the existence of probable cause authorizes state seizure by way of (1) arrest, and (2) search to prevent destruction of evidence (see *State v. Chinn*, *supra*, at 267), there appears no reason to require the police to do both or neither. If the public safety is satisfied by the lesser invasion of defendant's privacy, by search alone, the law should not encourage, or indeed require, the police to arrest prematurely in order to justify a search already justified by prior probable cause.

We hold that the right of the police to search without a warrant is a right not solely dependent upon a prior or contemporaneous arrest. The relevant issue is not whether the defendant was arrested, but whether the warrantless search was based on probable cause. The questions basic to this determination are:

- (1) Did the police have probable cause to believe that a search of the defendant's person would result in the finding of evidence of homicide?

(2) Did the police have probable cause to believe that if the search were not made immediately without taking the time to seek and obtain a warrant the evidence might well be lost?

State v. Keith, 2 Or App 133, 465 P2d 724, Sup Ct.

The facts in the case at hand justified the warrantless search. At the time the police took the fingernail scrapings they had probable cause to believe that the defendant was guilty of strangling his wife. They did not have evidence beyond a reasonable doubt, but they did have what they needed, i.e., reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief. *State v. Keith*, supra.

One of the detectives who had had previous experience in this type of homicide knew that throat lacerations were frequently produced by fingernails and that evidence in the form of blood, skin and fibers could sometimes be found under the fingernails of assailants in such cases. At the time the detectives took these scrapings they knew:

The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather than to a burglar or other stranger.

The decedent's son, the only other person in the house that night, did not have fingernails which could have made the lacerations observed on the victim's throat.

The defendant and his deceased wife had had a stormy marriage and did not get along well.

The defendant had, in fact, been at his home on the night of the murder. He left and drove back to

central Oregon claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate.

Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, (scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. The search of the defendant did not violate his constitutional rights to freedom from unreasonable search and seizure.

Affirmed.